SUPREME COURT, U. S.

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JOHN F. DAVIS, CL

No. 511

Supreme Court of the United States

OCTOBER TERM, 1969

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, *Respondents.*

BRIEF FOR RESPONDENT INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

The only question presented herein is whether there was sufficient evidence on this particular record, considered as a whole, to support the decision of the Respondent National Labor Relations Board ("Board") that, under the circumstances shown in this case, Petitioner, The Prudential Insurance Company of Amer-

ica, violated its duties under the National Labor Relations Act by refusing, upon request, to provide the names and addresses of its employees in the bargaining unit to the collective bargaining representative of the employees in that unit, Respondent Insurance Workers International Union, AFL-CIO ("Union").

The principal Questions Presented recited in the Petition are not in fact presented in this case. Petitioner's assertion in its first Question that this case involves "an obligation to provide an incumbent union with a list of home addresses of nonmembers of the union *for use by the union for organizational purposes in order to enhance the union's bargaining power*" (Pet. 2, emphasis added), as well as its second Question, which is on its face limited to "*such* a list of home addresses" (*id.* at 3, emphasis added), is contrary to the plain facts: the Union requested the list of names and addresses as necessary for it properly to perform its duties as the collective bargaining representative, for purposes of both contract administration and negotiations for a new contract; the Board unanimously found that the information was necessary for use by the Union as the collective bargaining representative; and the Court below read the record identically and affirmed the Board on that basis. Both the Board and the Court did not see the issues in the case as those now presented by Petitioner in its Questions 1 and 2. Manifestly, neither the Board nor the Court considered, let alone decided, the principal Questions Presented by Petitioner. Indeed, Petitioner itself, in its third Question, acknowledges that the Court below was concerned with the Union's channel "of communicating with nonmembers about collective bargaining or contract administration matters" (Pet. 3).

STATEMENT OF THE CASE

There is an additional page to be added to the history of the case as recited in the Petition. Subsequent to the decision of the Court below, Petitioner moved in that Court to be relieved from the mandate's taking effect immediately. On June 23, 1969, that Court denied Petitioner's motion. Thereupon Petitioner applied to Mr. Justice Harlan for a stay. On July 4, 1969, Mr. Justice Harlan denied a stay, finding "No sufficient reason for disturbing the Court of Appeals' denial of a stay."

In addition to the foregoing, some amplifications and clarifications of the facts as stated in the Petition are in order. The perspective of realism should be sharpened, in relation to the resources available to the Union and the nature of the debit insurance agent's work, the work of the employees involved in this case.

The Union has relatively small membership and quite limited resources. Its total membership—nationwide, all companies—is less than 24,000. As the record shows, it has few full-time employees, and only ten full-time organizers; again it merits emphasis that this is a total figure, for the entire nation and for all companies. Moreover, with few exceptions, Local Union officers and members are working insurance agents, who must perform the duties of their job to make a living. The very nature of those duties in this bargaining unit as well as generally requires personal, case-by-case dealing and transactions between the agent and the actual and prospective policyholders of the agent's employer. Consequently, the agents for the most part are working by themselves, out of immediate, plant-like contact with their fellow

employees. As the Board found, as one significant facet of the realities of this case, "the nature of an agent's duties is such that only a very small percentage of his time is spent in the office" (Pet. 8a; see also *id.* at n. 8).

It is during this limited time in the office that the grievance committees, which are composed of working agents and not Union employees, perform the grievance processing functions that are defined and circumscribed exclusively by the collective bargaining Agreement. Because of the conferences and reviews with Petitioner Company provided in the Agreement, a single grievance may consume the time of the grievance committee on four or more reporting days, in addition to the time and attention which the committee must also devote to discussions with the aggrieved agent. Manifestly, the picture which Petitioner strives to paint of the Union, the grievance committees and the entire record is one which is overly impressionistic, unrelated to the realities which appear of record and which the Board and the Court saw and considered in correct and *a fortiori* permissible focus.

ARGUMENT

This Petition should be denied. Petitioner has proffered no reason for a grant. There is no conflict; indeed, the only directly relevant Court of Appeals decision is consistent with the decision below. There is no question presented which is of general importance. In any event, the decisions of the Board and the Court of Appeals are manifestly correct.

1. Petitioner has the temerity to assert that this case "presents to this Court a conflict of substantial importance" (Pet. 17), without mentioning *Standard*

Oil of California v. *N.L.R.B.*, 399 F.2d 638 (9 Cir. 1968), the only other Court of Appeals decision which concerned a Board Order requiring an employer to provide the names and addresses of the employees in the bargaining unit, upon request, to the collective bargaining representative in that unit. Under the circumstances shown in that case, the Board had found that such a list should be provided (166 NLRB No. 45), and the Ninth Circuit unanimously enforced the Board Order. Far from there being any conflict, that decision is in perfect harmony with this decision, in terms both of its rationale and its result. The rationale of the Ninth Circuit was identical to that of the Court below, and proceeded in terms of an analysis and appraisal of the facts of the particular record.* The result in the Ninth Circuit case was identical to that below, an affirmance of the Board finding that upon the particular record the employer was guilty of an unfair labor practice, and enforcement of the Board Order directing the employer to provide the collective bargaining representative with the particular list.

2. The Petition itself does not even attempt any showing of general importance. Its substance is spent exclusively upon attempting to demonstrate that the Board and the Court were in error in their decision in this particular case. While even that effort is unsuccessful, the attention of this Court would not be merited even if error were shown. For "this Court does not sit for the benefit of the particular litigants * * * [nor to consider] the academic or the episodic."

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* Demonstrating the Board's case-by-case approach is the fact that Member Zagoria dissented in *Standard Oil* "based on the particular facts there presented", but joined in finding a violation in this case on the basis of the facts presented here (Pet. 6a, n. 5).

Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

Far from showing that this case involves real and recurrent problems of general importance, Petitioner cites no other cases in which the question has arisen of an employer's refusal to provide the bargaining representative with a list of the names and addresses of the employees in the bargaining unit. In fact, as we have seen, there is one other Court of Appeals decision on this question, a decision consistent with that of the Court below. The fact that only two cases have arisen since the Act became law in 1935 demonstrates there is here no question of general importance, particularly when the cases reflect identical approaches and judgments.

This case was decided on the basis of its own facts. Both the Board and the Court considered and decided it as turning on findings of fact. Both regarded this as an ordinary, run-of-the-mill case of refusal to bargain, involving the application of familiar and broad legal concepts to the particular facts. It bears reiteration that neither saw the case as presenting novel or difficult questions of law; they were both concerned with the unique facts of this case; and, indeed, even the Statement in the Petition (pp. 3-10) demonstrates how unique, how remote from any typical or common industrial relations picture, this case is. There is nothing in this unique setting justifying the attention of this Court.

3. Although this case is not worthy of review by this Court for the reasons discussed above, which are independent of the correctness of the decision of the Court of Appeals, we respectfully submit that its opinion

(Pet. 16a-30a) demonstrates that the correct conclusion was reached, and via correct legal reasoning. Indeed, the Petition does not assay any analysis of or attack upon the opinion as it actually reads; but rather, as we have seen, the Petition is quixotically addressed to questions created by Petitioner and not considered or decided by the Court.

In discussing the questions it poses, Petitioner is concerned only with a two-party relationship, that between the employer and the Union, disregarding entirely the employees themselves. But their rights under the Act to take concerted and collective action (or to refrain therefrom) are pertinent if not decisive. One example of Petitioner's myopia will suffice to make the point. *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), is referred to as involving "use of an employer's property by a union", with only incidental recognition that it insures "that the employees may exercise a fair, free and informed choice in their selection of a bargaining representative" (Pet. 12). Petitioner accepts *Wyman-Gordon* as correct, as indeed it must, but seeks to distinguish that case as involving "a union *seeking* representative status" (*ibid.;* emphasis in original). The invalidity of that distinction demonstrates the error in Petitioner's entire view. For employees have no less right to a "fair, free and informed choice" after an election than before. The subjects of choice are different, to be sure, whether or not to participate in collective action, in particular whether or not to join the Union, rather than whether or not to vote for the Union. But the right to a fair, free and informed choice is the same, and the corresponding right to be informed by both sides is the same. The individual employee has the identical need for the facts lest his exercise of statu-

tory rights be effectively denied or infringed by sheer ignorance, during the collective bargaining and the administration of collective bargaining contracts as during the election campaign. Accordingly, the distinction Petitioner imports to complain of the result below is utterly invalid.

The result below is in accordance with the Act and the judgment below is eminently correct. There is no conflict; the decision is in harmony with the only other Court of Appeals decision directly in point. There is no issue of general importance; the questions discussed by Petitioner are not presented and were not considered by the Board or the Court of Appeals; the case turns on its own special facts.

CONCLUSION

For the reasons stated herein, this Petition should be denied.

Respectfully submitted,

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